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In the
Supreme Court of the United States

OCTOBER TERM 2000

ROGER BATTLE,

Petitioner

versus

JAMES LeBLANC, Warden

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE DEFINITION OF "PENDING" USED IN THE AEDPA STATUTE OF LIMITATIONS, 28 U.S.C. § 2244(d), REQUIRES CONTINUOUS OR INTERMITTENT TOLLING OF THE LIMITATION PERIOD.

2. WHETHER, IN ITS DETERMINATION OF TIMELINESS AND PENDENCY UNDER THE AEDPA, A COURT MAY INTERPRETE STATE LAW DIFFERENTLY FROM ITS PLAIN MEANING AND APPLICATION.

LIST OF PARTIES

The parties to this case are the petitioner, Roger Battle, and respondent, James LeBlanc, Warden, Dixon Correctional Institute, Louisiana Department of Corrections.

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PRAYER

Petitioner Roger Battle respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 20, 2000, rehearing denied on December 5, 2000, to address the important questions of federal law and fundamental federal procedure presented herein, and to resolve the conflict among the Courts of Appeals and with the decisions of this Court created by the ruling below.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability ("COA"), which gives rise to this petition, is *Battle v. Leblanc*, #00-30718 (September 20, 2000, rehearing denied December 5, 2000), and is not reported. A copy of the order is attached to this petition as Appendix A. The Court of Appeals for the Fifth Circuit denied rehearing on December 5, 2000. A copy of that order is attached as Appendix B.

The United States District Court, Eastern District of Louisiana, denied a COA, #99-2882 (June 27, 2000, entered June 28, 2000). A copy of that order is included as Appendix C. The judgment of the district court denying relief (entered May 16, 2000) is unreported. A copy is included as Appendix D. The Order and Reasons of the district court, denying Battle's petition for habeas relief pursuant to 28 U.S.C. § 2254 (entered May 12, 2000), also is unreported. A copy is included as Appendix E.

The Louisiana Supreme Court denied supervisory writs as to the denial of post-conviction relief by the original state trial court on July 2, 1999, reported at *Battle v. Cain*, 99-0872 (La. 07/02/99); 747 So. 2d 17. The Louisiana Supreme Court denied

reconsideration on September 17, 1999, reported at *Battle v. Cain*, 99-0872 (La. 09/17/99); 747 So. 2d 559. A copy of each of those orders is attached as Appendix F and Appendix G, respectively.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Court of Appeals' judgment denying a certificate of appealability and affirming the ruling of the District Court denying Battle's petition as untimely was entered on September 20, 2000. Battle timely petitioned for and the Court of Appeals denied rehearing[1] on December 5, 2000. Consequently, this Court has jurisdiction under 28 U.S.C. § 1254(1). *Cf. Hohn v. United States*, 524 U.S. 236 (1998) (so holding as to jurisdiction over denials of COA for motions filed under 28 U.S.C. § 2255, applying the same statutes and law which govern habeas petitions filed under 28 U.S.C. § 2254). *See* Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Title 28, United States Code, Section 2244 provides, in pertinent part:

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[1] The Court of Appeals accepted and denied Roger Battle's Petition for Rehearing as a Motion for Reconsideration. (Order 12/5/00, Appendix B.)

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .

and

> (d)(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Title 28, United States Code, Section 2253 provides, in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . . .

Title 28, United States Code, Section 2254 provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment

> of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Louisiana Supreme Court Rule IX provides, in pertinent part:

> Section 6. An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ. . . .

STATEMENT OF THE CASE

The issues before the Court concern the Court of Appeals' denial of a certificate of appealability ("COA") requested by Battle and the underlying rulings by the District Court denying Battle's habeas petition as untimely and denying COA. Because the Court of Appeals reached only the "procedural error" prong of the analysis required by this Court's ruling in *Slack v. McDaniel*, 529 U.S. 473 (2000), the other component of the *Slack* test – whether it is reasonably debatable "that the petition states a valid claim of the denial of a constitutional right," 529 U.S. at 484 – is not at issue. The facts and proceedings necessary to the issues before the Court follow.[2]

A. CONDUCT OF THE CASE IN STATE COURT

Petitioner Roger Battle was convicted in 1992 in Jefferson Parish, Louisiana of attempted aggravated rape and aggravated burglary. He was sentenced to fifty (50) years on the first count and to thirty (30) years on the second, the maximum on each, to

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[2] Minimal other factual and procedural background, beyond what is strictly necessary, is provided to afford a complete picture.

run consecutively – a virtual life sentence. The conviction was affirmed by the Louisiana Court of Appeal. *State v. Battle*, 93-900 (La. App. 5th Cir. 3/29/94), 635 So. 2d 337 (rehearing denied). He sought and was denied discretionary review in the Louisiana Supreme Court. *State v. Battle*, 94-1592 (La. 10/28/94), 644 So. 2d 439. On April 23, 1997, Battle timely filed his only application for post-conviction relief in the trial court.

Since the beginning of his search for post-conviction relief, Mr. Battle has urged that his rights under the United States Constitution to due process, to protection from compelled self-incrimination, to confront the evidence against him and to assistance of counsel all were violated. There is no dispute that Battle asserts that these rights were violated by the state's prosecutorial misconduct in hiding significantly favorable evidence and then relying on its absence in grossly misleading closing argument; by his trial lawyer's ineffectiveness in failing to obtain critical audiotapes for expert analysis, failing to introduce available evidence significantly impeaching the capacity of the only eyewitness to identify the perpetrator; by the state's repeated playing to the jury (more than three times) of the central evidence in the case, a vulgar, disgusting audiotape which was used by the perpetrator, and by being forced by the court, in front of the jury, to refuse to read transcript of the tape and to invoke his Fifth Amendment privilege repeatedly. He also has urged throughout that the state did not present sufficient evidence to prove the specific intent to commit aggravated rape required under Louisiana law for a valid conviction of attempt.[3]

Mr. Battle was granted an evidentiary hearing by the trial

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[3] Attempted aggravated rape is defined under Louisiana law by La. R.S. 14:41 (rape), La. R.S. 14:42 (aggravated rape) and La. 14:27 (attempt).

court, at which he presented uncontested proof of the evidence hidden by the state, the lack of which had been relied on repeatedly by the state, and of extensive evidence which his trial lawyer had available, but failed to present, which would have cast serious doubt on the only eyewitness's ability to make a reliable identification. Battle, through post-conviction counsel sought review of the trial court's denial as to every ground for relief, up to the highest state court.

There is no dispute that, because Battle filed his first post-conviction petition in state court on April 23, 1997, he had one day remaining under the statute of limitations, 28 U.S.C. § 2244(d)(1), as enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), from the time his state post-conviction was finally disposed of, to file his habeas petition in federal court.

The Louisiana Supreme Court denied timely filed application for writs on July 2, 1999. *Battle v. Cain*, #99-0872 (La. 07/02/99); 747 So. 2d 17 (Appendix F.) Counsel timely sought reconsideration, denied on September 17, 1999. *Battle v. Cain*, #99-0872 (La. 09/17/99); 747 So. 2d 559 (Appendix G.) The next day, counsel filed Battle's federal habeas petition, pursuant to 28 U.S.C. § 2254, in United States District Court for the Eastern District of Louisiana.

B. PROCEEDINGS IN FEDERAL COURT

The state responded to Battle's petition by raising the affirmative defense that it was time-barred under the AEDPA statute of limitations. 28 U.S.C. § 2244(d)(1) and (2). The federal magistrate judge rejected the state's interpretation and

recommended that the petition was timely.[4] The magistrate judge also recommended to deny the requested evidentiary hearing and to deny on the merits each of the claims in the petition. Battle timely objected to the recommendation as to every claim, and to the denial of evidentiary hearing.

The District Court rejected the magistrate judge's recommendation as to timeliness and denied the petition as untimely.[5] The District Court reasoned that the 1-year limitation period was not tolled, i.e., that a properly filed post-conviction application was not "pending", in the intervals between state court rulings and application for review by higher state courts of review. (Order and Reasons, Appendix E.)

Battle timely filed notice of appeal (a copy is included as Appendix J) and requested a COA from the District Court as to untimeliness and to the dismissal of each of the claims in his petition. (A copy of Battle's Application to the District Court for COA is included in Appendix I.) The District Court denied a COA on any of the issues presented, based on the following reasons: "Petitioner has not made a substantial showing of the

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[4] The Magistrate's Report and Recommendations, in pertinent part as to the issue of timeliness, is included as Appendix L.

[5] To its Order and Reasons, devoted entirely and expressly to untimeliness and the application of the tolling provision, 28 U.S.C. § 2244(d)(2), the District Court added a single footnote claiming to "modify" the Magistrate's Report and Recommendation and to "adopt[] the portion...denying Battle's petition on the merits." Appendix E, p.1. Assuming, *arguendo*, that that met the standard for *de novo* review applicable to magistrate recommendations submitted over objection, 28 U.S.C. § 636(b)(1) and F.R.C.P. 72(b), what is before the Court is only the District Court's denial of Battle's petition *as untimely*, and its and the Court of Appeals' refusal to issue a COA as to that procedural bar.

denial of any constitutional right. Reasonable jurists would not disagree about the result reached by the court." (District Court Ruling, Appendix C.)

Battle went on to seek a COA with the Court of Appeals for the Fifth Circuit as to untimeliness and the dismissal of each of the substantive claims in his petition. (Application to the Court of Appeals for COA, copy included as Appendix K.) The Fifth Circuit addressed only appeal of the dismissal as time-barred and denied a COA as to that issue. (Order, Appendix A) Battle sought rehearing (Petition for Rehearing, copy included in Appendix H) and the Court of Appeals denied, as denial of "reconsideration," on December 5, 2000.

The Court of Appeals' errors in interpreting "pending" in 28 U.S.C. § 2244(d)(2) – under either alternative interpretation of the grounds for its ruling – have served to bar Roger Battle from any access whatsoever to appellate judicial review of the merits of his habeas claims.[6]

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[6] Especially because this is a *first-filed* habeas petition, its dismissal is "a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 527 U.S. 314, 324 (1996).

REASONS FOR GRANTING THE PETITION

INTRODUCTION – THE DEFINITION OF PENDENCY UNDER 28 U.S.C. § 2244(d)(2) IS AN IMPORTANT FEDERAL QUESTION.

In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court again addressed the domain of habeas law under the dictates of the AEDPA. The Court emphasized that "the writ of habeas corpus plays a vital role in protecting constitutional rights," 529 U.S. at 483, and that "the vindication of substantial constitutional rights on appeal," *id.*, is an essential part of the operation of the Great Writ. By its decision, establishing a threshold inquiry which, if met, "should" allow review of a decision barring a habeas petitioner from federal court, the Court established a procedural safeguard implementing the Great Writ and recognized the importance of access to that judicial review.

Under the rule pronounced in *Slack*, when the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," 529 U.S. at 484, a COA "should" issue.[7] Because both conditions are necessary, a court may properly deny COA if it finds either lacking. *Slack*, 529 U.S. at 485. Under another fundamental principle of judicial economy, *see id., citing Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), a court should turn to examine the correctness of the procedural bar before addressing the constitutional issue. The District Court did

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[7] The Court implied that the issuance of a COA, where those conditions are met, is mandated to protect the petitioner's due process right to judicial review, but did not so expressly hold.

so here.

The examination for timeliness is thus the threshold inquiry which every single federal court performs in every single habeas case. In every case filed under 28 U.S.C. § 2254, the district court will apply the statute of limitations defined in 28 U.S.C. § 2244(d). In every case in which a petitioner has filed an application for state post-conviction relief – the vast majority of 2254 habeas cases – the district court will apply the tolling provision, 28 U.S.C. § 2244(d)(2). The definition of whether and how long state post-conviction proceedings were "pending" is one of the two core inquiries of the AEDPA statute of limitations. This Court recently granted certiorari and clarified the other core inquiry governing application of the AEDPA statute of limitations, whether the application was "properly filed" in state court.[8] *Artuz v. Bennett*, __ U.S. __, 121 S. Ct. 361 (2000). The

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[8] Congruent with the approach to "pending" and with regard to the principles of comity and federalism urged herein, this Court affirmed the approach of the Second Circuit -- and most of the Courts of Appeals to have addressed the issue -- by looking to the plain meaning of the term "properly filed", and of state procedural law defining it, rather than by examining the merits of the claim. *Artuz v. Bennett*, __ U.S. __, 121 S. Ct. 361 (2000) (The Court pointed out that the phrase "properly filed" modifies "application" and not "claim." 121 S. Ct. at 218-219.) Several Courts of Appeals have relied expressly on the principles of comity and federalism. *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998); *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir.), *reh. en banc denied*, 196 F.3d 1259 (1999), *and Habteselassie v. Novak*, 209 F.3d 1208, 1212 n.6 (10th Cir. 2000) (Colorado); *and see Bennett v. Artuz*, 199 F.3d 116, 122 (2d Cir. 1999), *aff'd sub nom. Artuz v. Bennett*, __ U.S. __, 121 S. Ct. 361 (2000) ("beyond the appropriate role of a federal court" to "mak[e] determinations as to the proper outcome of pending state proceedings based on state law when a state court is positioned to make the very same decision").

definition of "pending" presented in this petition likewise deserves the Court's attention.

THE PROBLEMS WITH THE RULINGS BELOW

The District Court based its denial of relief on an interpretation of the tolling provision in 28 U.S.C. § 2244(d)(2) applied to the AEDPA limitation period – an interpretation aptly called the "gap theory".[9] That is, the District Court reasoned that "pending"should be construed strictly to mean only that time when the petitioner's collateral proceeding was actually pending before a state court, and should not include the intervals between rulings and applications for review.

The Fifth Circuit denied Battle's request for COA and cited the rule enunciated recently in *Slack* – "Battle must show that jurists of reason would find it debatable that the district court erred in dismissing the petition as time-barred". Order, Appendix A. The Court of Appeals ruled that "Battle has failed to meet this standard," implying that reasonable jurists would *not debate* that the district court erred, but then cited as authority Louisiana Supreme Court Rule IX, § 6.[10] *Id.*

Either the Fifth Circuit upheld the District Court's dismissal on the grounds set forth by the District Court, or it applied another reason for dismissal altogether. An analysis of the error in each alternative presents equally compelling reasons

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[9] *Hernandez v. Caldwell*, 225 F.3d 435, 438 (4th Cir. 2000), citing *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999).

[10] The Court of Appeals also cited *Williams v. Cain*, 217 F.3d 303, 309-311 (5th Cir. 2000). As is discussed below at n.11, the case cited is inapposite.

for this Court to grant review.

I. UNDER THE FIRST ALTERNATIVE, THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION – THE DEFINITION OF PENDENCY OF STATE COLLATERAL REVIEW UNDER THE AEDPA – IN CONFLICT WITH EVERY OTHER CIRCUIT TO ADDRESS THE ISSUE.

If the court of appeals was affirming the District Court's reason for dismissal as time-barred, it was applying an interpretation of pendency under the tolling provision of 28 U.S.C. 2244(d)(2) which has been repudiated by every circuit to address it. *E.g.*, *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *cert. granted on other grounds, sub nom. Artuz v. Bennett*, 529 U.S. 1065 (2000); *Swartz v. Meyers*, 204 F.3d 417 (3d Cir. 2000); *Spencer v. Sutton*, __ F.3d ___, 2001 U.S. App. LEXIS 1756 (4th Cir. 2001); *Mills v. Norris*, 187 F.3d 881 (8th Cir. 1999); *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000); *Barnett v. Lemaster*, 167 F.3d 1321 (10th Cir. 1999); and *Guenther v. Holt*, 173 F.3d 1328 (11th Cir. 1999), *reh. denied*, 189 F.3d 487 (1999), *cert. denied*, 528 U.S. 1085 (2000); *and see Gaskins v. Duval*, 183 F.3d 8 (1st Cir. 1999), *dismissed on remand*, 89 F. Supp. 2d 139 (D. Mass. 2000) (tolling the interval between the denial of state post-conviction by the trial court and timely filing for review by state appellate court, but noting *dictum*). It was also applying law in conflict with its own jurisprudence. *Compare, e.g., Fields v. Johnson*, 159 F.3d 914 (5th Cir. 1999) *and Hall v. Cain*, 216 F.3d 518 (5th Cir. 2000) (both apply the rule but do not state it).

The "gap theory", disallowing the time intervals between the state court rulings on applications for post-conviction relief and filing for review by higher state courts, is inimical to the

exhaustion doctrine, codified at 28 U.S.C. § 2254(c), a fundamental feature of habeas law. *Swartz v. Meyers*, 204 F.3d at 422; *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999), *cert. denied sub nom. Lee v. Taylor*, 528 U.S. 1197 (2000); *Mills v. Norris*, 187 F.3d at 883-84; *Nino v. Galaza*, 183 F.3d at 1005; and *Barnett v. Lemaster*, 167 F.3d at 1323.

If the Court concludes that the Court of Appeals for the Fifth Circuit upheld, or could be considered to have upheld, the District Court's definition of pendency under the "gap theory", this Court should grant certiorari to correct the conflict in the Circuits thus created.

II. THE FIFTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION – THE DEFINITION OF "PENDENCY" OF STATE COLLATERAL REVIEW – IN CONFLICT WITH THE DECISIONS OF THIS COURT APPLYING THE DOCTRINES OF COMITY AND FEDERALISM TO THE AEDPA.

In the more likely alternative, the Fifth Circuit was asserting new grounds for denying Battle's COA as to untimeliness, the more likely reading, given the authority cited. In that case, the Court of Appeals was reaching out to create an interpretation of a Louisiana state law which is not supported in the plain words of that law, and which is not consistent with the Louisiana Supreme Court's own application of the law. In doing so, the Fifth Circuit has stepped over the bounds prescribed by the doctrines of federalism and comity which this Court has consistently applied to habeas practice and specifically applied to the interpretation of the AEDPA.

The authority cited by the Fifth Circuit for the untimeliness of Battle's petition is "La. S. Ct. R. IX, § 6 [and]

Williams v. Cain, 217 F.3d 303, 309-11 (5th Cir. 2000)."[11] Louisiana Supreme Court Rule IX is captioned "REHEARINGS." Section 6 provides, in pertinent part:

> An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ . . . .

By this citation, the Fifth Circuit apparently adopted a portion of the state's argument which was rejected by the magistrate judge. Report and Recommendation, Appendix L, pp. A-25-27. The state argued that, because the Louisiana Supreme Court Rules prohibit application for *rehearing* "when the court has merely...denied an application for...supervisory writ," Battle's state post-conviction case was finally concluded on July 2, 1999, when the Louisiana Supreme Court denied his application for supervisory writs, and not on July 17, 1999, when the Louisiana Supreme Court denied Battle's Motion for Reconsideration. The state referred incorrectly to Battle's Motion for Reconsideration

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[11] The case cited, *Williams v. Cain*, had and has no bearing on the issue before the Court. As Battle's habeas attorney argued to the Court of Appeals, Petition for Rehearing, Appendix H, pp.12-13, *Williams* addressed the pendency of that petitioner's collateral review after writs were denied by the Louisiana Court of Appeal (the intermediate appellate court in Louisiana). Williams did not timely file his application for supervisory writs with the Louisiana Supreme Court. Under unambiguous and uniformly applied Louisiana law, there is a 30-day period allowed for seeking writs of review from the highest state court. *See* La. Sup. Ct. Rule X, § 5. The *Williams* court correctly ruled that the state post-conviction case was not "pending" – and the limitation period accordingly was not tolled – for the fourteen months which passed before Williams finally filed his application with the Louisiana Supreme Court.

as an "application for rehearing" and never addressed the distinction.

By adopting this interpretation, the Fifth Circuit has created a rule of Louisiana law that, if the Louisiana Supreme Court "merely" denies supervisory writs, then the pendency of any timely filed *motion for reconsideration* will not continue to toll the 1-year limitation period. The Fifth Circuit has also created a rule of Louisiana law equating an "application for rehearing" with a "motion for reconsideration". That interpretation is simply not supported in Louisiana law and contradicts the practice of the Louisiana Supreme Court.[12]

A. THE "RULE IX" CREATED BY THE FIFTH CIRCUIT IGNORES A DISTINCTION IN THE PLAIN LETTER OF THE LOUISIANA LAW.

Louisiana Supreme Court Rule IX applies to *applications for rehearing* and to *rehearing*. Battle did not apply for rehearing with the Louisiana Supreme Court. He filed a *motion for reconsideration*. The Louisiana Supreme Court recognizes that these are separate and distinct procedural mechanisms. *Compare, e.g., Bouillion v. PPG Indus., Inc.*, 99-1726 (La. 6/16/99); 745 So. 2d 605, 1999 La. LEXIS 1933 (plaintiff applying for rehearing on the court's previous order granting supervisory writs) *with Boullion v. PPG Indus., Inc.*, 99-1726 (La. 6/17/99); 745 So. 2d 606, 1999 La. LEXIS 1930 (defendants "applying for reconsideration of this Court's order on the application for Rehearing"). The Fifth Circuit's interpretation of Rule IX simply

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[12] Moreover, it is incongruous with the Fifth Circuit's own practice to equate the two procedural vehicles. In its own Order Denying Rehearing, the Court of Appeals expressly noted the distinction.

elides the two. That might not be an affront to concerns of federalism comity if it weren't for the fact that the Fifth Circuit's version of Rule IX, § 6 flies in the face of the Louisiana Supreme Court's own practice.

B. THE "RULE IX" APPLIED BY THE FIFTH CIRCUIT CREATES A RULE OF LOUISIANA LAW NOT REFLECTED IN THE LOUISIANA SUPREME COURT'S OWN PRACTICE.

There are numerous examples in Louisiana jurisprudence of the Louisiana Supreme Court entertaining motions to reconsider after "mere denial" of writs. The court has granted reconsideration after the barest denial of writs. *Compare, e.g., Dickinson v. District Judge, 19th Judicial Dist. Court,* 93-2271 (La. 07/01/94); 639 So. 2d 1183 (granting reconsideration) *with id.*, (La. 06/03/94); 637 So. 2d 495 ("Denied."); *Bossier City v. Brumfield*, 516 So. 2d 1156 (La. 1987) (granting reconsideration) *with id.*, 514 So. 2d 134 (La. 1987) ("Denied.") *and compare State v. Tannehill*, 420 So. 2d 162 (La. 1982) (granting reconsideration) *with id.*, 416 So. 2d 941 (La. 1982) ("Denied."); *and cf. CLECO v. JO'MIL Corp.*, 582 So. 2d 1140 (La. 1991) (granting reconsideration) *with id.*, 582 So. 2d 1307 (La. 1991) ("Denied. [one sentence]").

This is also the Louisiana Supreme Court's practice specifically in criminal and post-conviction cases. *Compare, e.g., State ex rel. Lewis v. State*, 514 So. 2d 1156 (La. 1987) (granting reconsideration) *with id.*, 512 So. 2d 1174 (La. 1987) ("Denied."); *State ex rel. Green v. Clark*, 512 So. 2d 427 (La. 1987) (granting reconsideration) *with id.*, 508 So. 2d 91 (La. 1987) ("Denied."); *State ex rel. Glass v. State*, 507 So. 2d 1246 (La. 1987) (granting reconsideration) *with id.*, 507 So. 2d 1245 (La. 1987) ("Denied."); *State ex rel. Martin v. Foti*, 507 So. 2d 234 (granting reconsideration) *with id.*, 501 So. 2d 218 (La. 1987) ("Denied.') *and State ex rel. Woods v. State*, 462 So. 2d 199 (La.

1984) (granting reconsideration and ordering an evidentiary hearing) *with id.*, 460 So. 2d 598 (La. 1984) ("Denied.").

Also, the Louisiana Supreme Court expressly designates when reconsideration is denied pursuant to Rule IX, Section 6. *E.g., State ex rel. J.S.*, 99-0088 (La. 05/07/99); 740 So. 2d 1294 ("Not considered. Supreme Court Rule IX, section 6."); *accord Sullivan v. Wallace*, 99-0010 (La. 04/01/99); 741 So. 2d 1277; *Chatman v. State*, 98-0259 (La. 05/15/98); 719 So. 2d 64 ("Reconsideration denied. See Rule IX, Sec. 6 La. Supreme Court Rule [sic]."). That court also expressly rejects some motions as "Not considered," without reference to Rule IX. *E.g., State v. Beridon*, 456 So. 2d 1004 (La. 1984) *and State ex rel. Douresseau v. Pavy*, 383 So. 2d 784 (La. 1980).

There are numerous other cases, like the denial in Mr. Battle's case, where, following a "mere denial" of supervisory writs (assuming the barest denial, "Denied."), the Louisiana Supreme Court simply states "Reconsideration denied." *E.g., Brown v. Audubon Ins. Co.*, 94-2816 (La. 02/17/95); 650 So. 2d 258, following *id.*, (La. 01/13/95); 648 So. 2d 1344; *State v. Jones*, 94-2587 (La. 11/18/94); 645 So. 2d 629, following *id.*, (La. 10/28/94); 644 So. 2d 658 *and Shaw v. Bourn*, 619 So. 2d 533 (La. 1993), following *id.*, 618 So. 2d 409 (La. 1993).

The Fifth Circuit's interpretation of Louisiana Supreme Court Rule IX, section 6, imputing it to invalidate, across-the-board, motions for reconsideration following "mere denial" of supervisory writs by that court, is simply unsupported. Such a rule is not reflected in and is contradicted by Louisiana's own jurisprudence. At the very least, because the hybridized Rule IX rule fashioned by the Fifth Circuit is neither firmly established nor regularly applied in Louisiana practice, it is not adequate to preclude federal court review of the merits of any claim. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991), citing *James v. Kentucky*,

466 U.S. 341 (1984).

C. THE FIFTH CIRCUIT'S CREATION (OR MODIFICATION) OF LOUISIANA LAW IN ITS APPLICATION OF THE AEDPA VIOLATES THE FUNDAMENTAL PRINCIPLES OF FEDERALISM AND COMITY WHICH INHERE IN HABEAS LAW.

Respect for the states' laws and legal processes and a careful maintenance of respect for the boundary between federal and state spheres of influence are bedrock principles of the AEDPA and of pre-AEDPA habeas law. This Court recently underscored the fundamental importance of those principles -- comity and federalism -- and that they infuse habeas law. The Court cautioned, in *Williams v. Taylor,* 529 U.S. 420 (2000):

> There is no doubt Congress intended AEDPA to advance these doctrines. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 726, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); *McCleskey v. Zant*, 499 U.S. 467, 493, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) ("The doctrines of procedural default and abuse of the writ are both

> designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments").

529 U.S. at 436.

The Fifth Circuit's basis for holding Mr. Battle's petition untimely and thereby denying a COA to review that decision -- by fashioning a Louisiana law nowhere found in Louisiana jurisprudence -- violated the essential spirit and purpose of the AEDPA and of habeas law, generally. Concern for the core principles expressed by this Court in *Taylor*, above, warrant this Court's exercise of its supervisory authority, at least, to correct the Fifth Circuit's interference with Louisiana law.

Indeed, by its misapplication of Louisiana Supreme Court Rule IX, § 6, the Fifth Circuit has engaged in making, or modifying, Louisiana law. That is activity which violates not only the principles of comity and federalism, but also violates the Court of Appeals' jurisdictional power. The powers of the Judicial Branch are set forth in Article III, § 2 of the United States Constitution and nowhere state or imply the power to make or modify the law in any state. The Fifth Circuit simply lacks the authority to issue the ruling it did in this case.

If it agrees that the Fifth Circuit Court of Appeals based its denial on its interpretation of Louisiana law, this Court should grant certiorari to safeguard the bedrock principles of comity and federalism which have been violated by the Court of Appeals' undertaking to create, or modify, Louisiana law.

CONCLUSION

WHEREFORE, the foregoing reasons considered, this Court is respectfully urged to grant Roger Battle's petition for writ of certiorari.

New Orleans, Louisiana, this 2nd day of March, 2001.

MARTIN E. REGAN, JR.
Counsel of Record
LANE RUTHERFORD TRIPPE
2125 St. Charles Avenue
New Orleans, Louisiana 70130
(504) 522-7260

Attorneys for Petitioner
Roger Battle

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30718
USDC No. 99-CV-2882-F

FILED
SEP 20 2000

ROGER BATTLE,

Petitioner-Appellant,

versus

JAMES LEBLANC, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

O R D E R:

Roger Battle, a Louisiana state prisoner, has applied for a certificate of appealability (COA) to appeal the district court's dismissal of his habeas petition as time-barred under 28 U.S.C. § 2244(d) (1). To obtain a COA, Battle must show that jurists of reason would find it debatable that the district court erred in dismissing the petition as time-barred. See Slack v. McDaniel, 102 S. Ct. 1595, 1604 (2000). Battle has failed to meet this standard. See LA. S. CT. R. IX, § 6; Williams v. Cain, 217 F.3d 303, 309-11 (5th Cir. 2000). Consequently, COA is DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30718

FILED
DEC 05 2000

ROGER BATTLE

Petitioner - Appellant

v.

JAMES LEBLANC, Warden

Respondent - Appellee

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

BY THE COURT:

A member of this panel previously denied a certificate of appealability. The panel has considered appellant's petition for rehearing, treated as a motion for reconsideration. IT IS ORDERED that the motion is Denied.

APPENDIX C

FILED
2000 JUN 27

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Roger Battle	CIVIL ACTION
VERSUS	NO. 99-2882
James LeBlanc	SECTION "F" (6)

CERTIFICATE OF APPEALABILITY

A notice of appeal having been filed in the captioned habeas corpus case, in which the detention complained of arises out of process issued by a state court, the court, considering the record in the case and the requirement of FRAP 22(b), hereby orders that:

( ) a certificate of appealability shall be issued having found that petitioner has made a substantial showing of the denial of a constitutional right related to the following issue(s):

(✓) a certificate of appealability shall not be issued for the following reason(s):
Petitioner has not made substantial showing of the denial of any constitutional right. Reasonable jurists would not disagree about the result reached by the court.

Date: 6.27.00

/s/ Martin L.C. Feldman
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY
JUN 28 2000

APPENDIX D

FILED
2000 MAY 15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER BATTLE	CIVIL ACTION
VERSUS	NO. 99-2882
JAMES LEBLANC, WARDEN	SECTION "F"

JUDGMENT

For the written reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment denying the petition of habeas corpus relief with prejudice.

New Orleans, Louisiana, this 15th Day of May, 2000.

/s/ Martin L.C. Feldman
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY
MAY 16 2000

APPENDIX E

MINUTE ENTRY
FELDMAN, J.
May 11, 2000

FILED
2000 MAY 11

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER BATTLE	*	CIVIL ACTION
VERSUS	*	NO. 99-2882
JAMES LEBLANC, WARDEN DIXON CORRECTIONAL CENTER	*	SECTION "F"

Before the Court is petitioner's objections to the Magistrate's Report and Recommendation denying his application for federal habeas corpus relief. For the following reasons, the Report and Recommendation of the Magistrate is modified and the petitioner's application under 28 U.S.C. § 2254 is DENIED as untimely.[1]

The petitioner, Roger Battle, is currently incarcerated at the Dixon Correctional Center in Jackson, Louisiana. On October 23, 1992, Battle was convicted of attempted aggravated rape and aggravated burglary. His conviction

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[1] Although the Court modifies the Magistrate's Report and Recommendation and denies petitioner's application as untimely, the Court adopts the portion of the Report and Recommendation denying Battle's petition on the merits.

DATE OF ENTRY
MAY 12 2000

became final on October 28, 1994, when the Louisiana Supreme Court denied his application for supervisory writs. On April 23, 1997, the petitioner filed his application for post-conviction relief in state trial court. This application was denied by the trial court on September 22, 1998. The petitioner sought, and was granted, an extension of time in which to file a writ to the Louisiana Court of Appeal, Fifth Circuit until February 15, 1999. Battle timely filed his application which was denied on February 24, 1999. Battle subsequently filed an application for supervisory writs to the Louisiana Supreme Court which was denied on July 2, 1999. Battle's motion for reconsideration on the application was denied on September 17, 1999.

Battle filed his application for federal habeas relief on September 18, 1999, after the April 24, 1996, effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), and therefore, his application for federal post-conviction relief is governed by its provisions. Under the AEDPA, "a person in custody pursuant to the judgment of a state court" has one year to file a § 2254 petition. 28 U.S.C. § 2244 (d) (1). Because Battle's conviction became final prior to the enactment of the AEDPA, his limitation period begins to run on the effective date of the AEDPA. Fisher v. Johnson, 174 F.3d 196 710 (5th Cir. 1999). Thus, on its face, Battle's application is time barred because it was filed almost five years after his conviction became final. However, under the AEDPA, the one year limitation period is tolled during the time that a "properly filed application for State post-conviction or other collateral review" is pending. 28 U.S.C. § 2244 (d) (2).

On April 6, 2000, the Magistrate issued a Report and Recommendation finding that Battle's federal application was timely filed, but recommending that it be denied on the merits. The Magistrate found that Battle's petition was pending under 28 U.S.C. § 2244 (d) (2) from the time he filed his application for post-conviction relief in the state trial court on April 23,

1997, until the Louisiana Supreme Court ultimately denied post conviction relief on September 17, 1999.

Under the plain language of the AEDPA, Battle's limitation period was only interrupted during the time his "properly filed" application for state post conviction relief was pending. After the state trial court denied his petition on September 22, 1998, the limitations period began to run again. Battle did not file his appeal of the trial court's denial until February 17, 1999.[2] Because Battle initially filed his application for state post-conviction relief on April 23, 1997, 364 days after the AEDPA was enacted, Battle only had one day left remaining to file his federal application after the state trial court denied his petition. That means that Battle should have filed his federal application no later than September 23, 1998. He did not file his federal application until almost one year later on September 18, 1999. Thus, the Court finds that Battle's application is untimely.

Accordingly,

IT IS ORDERED: that petitioner's application for post-conviction relief is DENIED with prejudice.

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[2] The Court notes that at all times during post-conviction proceedings and the appeal process, Battle was represented by counsel.

APPENDIX F

The Supreme Court of the State of Louisiana

STATE EX REL
ROGER BATTLE
VS. NO. 99-KP- 0872
BURL CAIN

IN RE: Battle, Roger; - Plaintiff(s); Applying for Supervisory and/or Remedial Writs; Parish of Jefferson 24th Judicial District Court Div."I" Number 92-1188; to the Court of Appeal, Fifth Circuit, Number 99-KW-0196

July 2, 1999

Denied.

JTK
PFC
WFM
HTL
BJJ
JPV
CDT

KIMBALL, J. not on panel.

Supreme Court of Louisiana
July 2, 1999

/s/ illegible
Clerk of Court
For the Court

APPENDIX G

The Supreme Court of the State of Louisiana

ROGER BATTLE
VS
BURL CAIN

99-KP-0872

In Re: Roger Battle, applying for Reconsideration to this Court's action dated July 02, 1999, from the 24th Judicial District Court, Parish of Jefferson No. 92-1188, Division I, Fifth Circuit Court of Appeal No. 99-KW-0196

September 17, 1999

Reconsideration denied.

WFM
PFC
HTL
BJJ
JPV
CDT
JTK

KIMBALL, J., not on panel.

Supreme Court of Louisiana
September 17, 1999

/s/ Rai T. Daigle
Deputy Clerk of Court
For the Court

APPENDIX H

RECEIVED
OCT 4 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROGER BATTLE	*	**CIVIL ACTION**
	*	
VERSUS	*	**CASE NO.: 00-30718**
	*	
JAMES LEBLANC, WARDEN,		**USDC No: 99-CV-2882-F**

FILED: _____ _____
DEPUTY CLERK

PETITION FOR A REHEARING

NOW INTO COURT, through undersigned counsel, comes ROGER BATTLE, petitioner-appellant herein, who, pursuant to Federal Rule of Appellate Procedure 40, seeks a panel rehearing of the decision issued by this Honorable Court on September 20, 2000 (Appendix "A"), denying his request for a certificate of appealability in the above-referenced habeas corpus matter on the grounds that his application for a writ of habeas corpus was not timely filed. Petitioner asserts the following grounds in support of this petition:

PROCEDURAL BACKGROUND

Petitioner's conviction became final on October 28, 1994 when his application for a writ of certiorari/review was denied by the Louisiana Supreme Court. State v. Battle, 94-1592 (La. 10/28/94), 644 So.2d 649. The Antiterrorism and Effective Death

Penalty Act, which imposed a one-year limitation on federal habeas corpus filing, was effective on April 24, 1996. Under applicable case law of this Circuit, Mr. Battle had until April 24, 1997 to file for federal habeas corpus relief. Flanagan v. Johnson, 154 F.3d 196, 199-200 (5th Cir. 1998); Kiser v. Johnson, 163 F.3d 326 (5th Cir. 1999).

On April 23, 1997, petitioner filed a petition for post-conviction relief in the state district court. Under 28 U.S.C. 2244 (d)(2), the limitation on filing for federal habeas relief was suspended as of this day. This state district court petition was denied on September 22, 1998 and petitioner subsequently filed an application for supervisory writs with Louisiana Fifth Circuit Court of Appeals on February 17, 1999. This application was denied on February 24, 1999. Petitioner then sought supervisory writs from the Louisiana Supreme Court on March 26, 1999. When this application was denied, petitioner then filed a Motion for Reconsideration which was also denied on September 17, 1999. Battle v. Cain, 99-0872 (La. 9/17/99), 747 So.2d 559.

The instant petition for a writ of habeas corpus was filed in the United States District Court for the Eastern District of Louisiana on September 18, 1999. The district court dismissed petitioner's application as time-barred on the novel theory that the 28 U.S.C. 2244 time limitation was not tolled during the following periods, vis: 1.) between the denial of his post-conviction relief application and his filing of an application for supervisory writs with the state appellate court; and 2.) between the denial of that writ application and the filing of his subsequent writ application with the Louisiana Supreme Court. In filings with this Court and the federal district court, petitioner has vigorously objected to this harsh and unwarranted reading of section 2244, noting that his two state court writ applications were properly and timely filed under state law. Petitioner further argued that because he had fully complied with state law procedural requirements, his post-conviction relief claim was "properly filed" within the meaning of 28 U.S.C. 2244 and his

federal habeas application was therefore timely. Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999).

Petitioner's subsequent Request for a Certificate for Appealability was denied by Circuit Judge Dennis as time-barred under 28 U.S.C. 2244(d)(1) on grounds apparently different from those of the district court. Although he did not elaborate his reasons for denying the request, Judge Dennis cited Louisiana Supreme Court Rule IX, §6 and Williams v. Cain, 217 F.3d 303 (5th Cir. 2000) in support of his decision.

ARGUMENT

Petitioner respectfully suggests that the authority cited by Judge Dennis is not apposite to the issue at hand. Louisiana Supreme Court Rule IX regulates requests for rehearing of Louisiana Supreme Court decisions and specifically forbids rehearings on the denial of an application for supervisory writs. La. Sup. Ct. Rule IX. In citing this rule, petitioner assumes that Judge Dennis either analogized or mistook the Motion for Reconsideration filed in the Louisiana Supreme Court as a Request for a Rehearing. The record before this Court, however, clearly shows that petitioner did not file a Request for a Rehearing. Instead, petitioner filed a Motion for Reconsideration, a distinctly different pleading, which is not precluded by Supreme Court rules. Indeed, the Louisiana Supreme Court accepted petitioner's motion for filing and, in a reported ruling, stated "Reconsideration Denied." Battle v. Cain, 99-0872 (La. 9/17/99), 747 So.2d 559. Nothing in the record suggests that the Motion for Reconsideration was not "properly filed" or was otherwise improper.

Petitioner further suggests that the case cited by Judge Dennis, Williams v. Cain, 217 F.3d 303 (5th Cir. 2000), is not relevant to the issue before the Court. The petitioner in Williams filed an application for supervisory writs in the Louisiana Supreme Court almost fourteen months after the intermediate

appellate court had denied his writ application. The Rules of the Louisiana Supreme Court require that such an application be filed within thirty days. *See* La. Sup. Ct. Rule X, §5. Despite the fact that his application was clearly out-of-time, Williams argued that the application nevertheless tolled the 2244 limitation because the Supreme Court has "unrestricted residual discretion . . . to consider any request for a supervisory or remedial writ" under the Louisiana Constitution. Thus, his argument went, any writ application is "properly filed" for purposes of 2244, regardless of its timeliness. *Id.* at 308. This Court rejected that argument because Louisiana law explicitly provides that an extension of the thirty-day time limitation is not permitted. Thus, any application filed after the thirty day period is, by definition, not "properly filed." *Id.* at 309.

Unlike the petitioner in Williams, Mr. Battle's filings in state court were all timely. Moreover, no provision of Louisiana law prohibits the filing of a Motion for Reconsideration, as the Supreme Court implicitly recognized in its decision. Thus, it is error to suggest that the 2244 time limitation in Mr. Battle's case was not tolled while this motion was before the Supreme Court.

Additionally, the denial of Mr. Battle's certificate of appealability is in error because jurists of reason would find it debatable whether the district court was correct in its procedural ruling and whether Judge Dennis' denial on different grounds was correct. The United States Supreme Court has held that a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order for a cause of action to issue when his application for *habeas* relief is denied on the merits. Slack v. McDaniel, _ U.S. _, 120 S. Ct. 1595, 1603 (2000) (quoting 28 U.S.C. § 2253(c)). Furthermore, this Court has held that to make a substantial showing "requires the applicant to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." Hill v.

Johnson, 210 F.3d 481, 484 (5th Cir. 2000) (quotes and citations omitted).

In this case, the district court denied petitioner's *habeas* application as time-barred and the subsequent ruling of Judge Dennis was based on analysis not previously used in a ***habeas*** proceeding. Therefore, reasonable jurists would find it debatable that the district court correctly found that Mr. Battle's application for a writ of *habeas corpus* was not timely filed pursuant to 28 U.S.C. § 2244(d) and that the supporting law used by Judge Dennis was correct in a habeas proceeding. Since reasonable jurists would find these issues debatable, Mr. Battle is provided with a cause of action.

For these reasons, petitioner avers that the Court improperly construed the law and facts relevant to this case. This decision put this Court in the unseemly position of placing constructions on Louisiana law which are not warranted by Louisiana jurisprudence, and further doing so to the detriment of the federal constitutional rights of a habeas corpus petitioner. Moreover, the apparent construction put on 28 U.S.C. 2244 by this Court in this case is unduly harsh and works a grave injustice, especially in light of the fact that this is not a "second or successive" petition for habeas corpus. As this Court said in Fisher v. Johnson:

> "We must be cautious not to apply the statute of limitations too harshly. Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."
>
> Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999) (Internal citations omitted)

CONCLUSION

For these reasons, petitioner Roger Battle therefore respectfully requests that this Court grant a rehearing on this issue and, after due proceedings herein, further grant him a Certificate of Appealability so that he may proceed with his habeas corpus claim.

Respectfully submitted,
LAW OFFICE OF LAURIE A. WHITE

/s/ Laurie A. White
Laurie A. White, #17898
633 Carondelet Street
New Orleans, LA 70130
Telephone: (504) 525-1020
Fax: (504) 525-1025

CERTIFICATE OF SERVICE

I, Laurie A. White, do hereby certify that a copy of the forgoing has been delivered to the State of Louisiana, through the District Attorney for the Parish of Jefferson, via U.S. Mail, postage pre-paid and properly addressed this 4th day of October, 2000.

/s/ Laurie A. White
LAURIE A. WHITE

APPENDIX I

FILED
2000 JUN 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER BATTLE	**CIVIL ACTION**
VERSUS	**NO: 99-2882**
JAMES LEBLANC, Warden	**SECTION: "F" (6)**

MOTION FOR CERTIFICATE OF APPEALABILITY

NOW INTO COURT, through the undersigned counsel, comes petitioner, ROGER BATTLE, who respectfully requests that this Court issue a certificate of appealability on the following grounds:

1) Whether petitioner's application for writ of *habeas corpus* was timely filed pursuant to 28 U.S.C. § 2244(d);

2) Whether petitioner's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution was violated when the State withheld exculpatory evidence;

3) Whether petitioner was denied his constitutional right to cross-examine the State's witnesses as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when the trial court prevented him from introducing relevant impeachment evidence;

DATE OF ENTRY
JUN 22 2000

4) Whether petitioner's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution was violated because the evidence adduced at his trial was insufficient to support the jury's verdicts;

5) Whether petitioner was denied his constitutional right to the effective assistance of trial and appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; and,

6) Whether petitioner's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution was violated when the State misled the jury regarding a crucial fact of the case during closing arguments.

7) Whether petitioner's right to due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated when he was asked to read from a transcript containing inflammatory and prejudicial material in front of the jury and when the same material was repetitiously and needlessly presented to the jury.

Respectfully submitted this 12th day of June, 2000.

LAW OFFICE OF LAURIE A. WHITE

/s/ Laurie A. White
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CERTIFICATE OF SERVICE

I, Laurie A. White, do hereby certify that a copy of the forgoing has been delivered to the State of Louisiana, through the District Attorney for the Parish of Jefferson, via U.S. Mail, postage pre-paid and properly addressed this 12th day of June, 2000.

/s/ Laurie A. White
LAURIE A. WHITE

APPENDIX J

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ROGER BATTLE	)	**CIVIL ACTION**
	)	
VERSUS	)	**NO: 00-30718**
	)	
JAMES LEBLANC, Warden	)	

REQUEST FOR CERTIFICATE OF APPEALABILITY

NOW INTO COURT, through the undersigned counsel, comes petitioner, ROGER BATTLE, who respectfully requests that this Court issue a certificate of appealability on the following grounds:

1) Whether the district court erred in denying petitioner's application for a writ of *habeas corpus* as untimely filed pursuant to 28 U.S.C. § 2244(d);

2) Whether the district court erred in ruling that petitioner's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution was not violated when the State withheld exculpatory evidence;

3) Whether the district court erred in ruling that petitioner was not denied his constitutional right to cross-examine the State's witnesses as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when the trial court prevented him from introducing relevant impeachment evidence;

4) Whether the district court erred in ruling that petitioner's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution was not violated because the evidence adduced at his trial was insufficient to support the jury's verdicts;

5) Whether the district court erred in ruling that petitioner was not denied his constitutional right to the effective assistance of trial and appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; and,

6) Whether the district court erred in ruling that petitioner's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution was not violated when the State misled the jury regarding a crucial fact of the case during closing arguments.

7) Whether the district court erred in ruling that petitioner's right to due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was not violated when he was asked to read from a transcript containing inflammatory and prejudicial material in front of the jury and when the same material was repetitiously and needlessly presented to the jury.

Respectfully submitted this 31st day of July, 2000.

LAW OFFICE OF LAURIE A. WHITE

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CERTIFICATE OF SERVICE

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/s/ Laurie A. White
LAURIE A. WHITE

APPENDIX K

FILED
2000 JUN 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER BATTLE	**CIVIL ACTION**
VERSUS	**NO: 99-2882**
JAMES LEBLANC, Warden	**SECTION: "F" (6)**

NOTICE OF APPEAL

Petitioner, Roger Battle, hereby gives notice of his appeal to the United States Court of Appeals for the Fifth Circuit from the Order and Judgment of the United States District Court for the Eastern District of Louisiana, Honorable Martin L.C. Feldman, United States District Judge, denying the petitioner's application for a writ of *habeas corpus*, which was filed pursuant to 28 U.S.C. § 2254. On May 11, 2000, the United States District Court entered its Order denying the petitioner's application for *habeas corpus* relief as time-barred. On May 15, 2000, the United States District Court entered Judgment denying with prejudice Battle's petition for a writ of *habeas corpus*.

Respectfully submitted this 12th day of June, 2000.

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APPENDIX L

FILED
2000 APR 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER BATTLE	*	**CIVIL ACTION**
VERSUS	*	**NO: 99-2882**
JAMES LEBLANC, WARDEN		**SECTION: "F" (6)**

REPORT AND RECOMMENDATION

This matter was referred to the United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to Title 28, United States Code, Sections 636(b)(1)(B) and (C), and, as applicable, Rule 8(b) of the Rules Governing Section 2254 cases.

Upon review of the entire record, the Magistrate Judge has determined that this matter can be disposed of without an evidentiary hearing. Accordingly, after considering the record and the applicable law, the Magistrate Judge issues this Report and Recommendation hereby recommending that the instant application for federal habeas corpus relief be **DENIED**.

. . .

Respondent argues that petitioner's federal application should be dismissed as being untimely in accordance with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) P.L. 104-132, 110 Stat. 1220, Title 28, United States Code,

DATE OF ENTRY APR 7 2000
DATE OF MAILING APR 7 2000

Section 2244(d)(1).[10] Petitioner's conviction became final on October 28, 1994, when his application for a writ of certiorari/review was denied by the Louisiana Supreme Court.

Habeas petitioners, like Roger Battle, whose convictions became final prior to the effective date of the AEDPA, have a one (1) year grace period ending on April 24, 1997,[11] within which to timely bring a federal habeas petition. Title 28, United States Code, Section 2244(d)(1). **Flanagan v. Johnson**, 154 F.3d 196 (5th Cir. 1998). The one year limitation period may be tolled, however, for the period of time during which a properly filed application for state post-conviction relief is pending. Title 28, United States Code, Section 2244(d)(2); **Fields v. Johnson**, 159 F.3d 914, 916 (5th Cir. 1998). Under that statutory provision, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation..."

Review of that state court record reveals that, subsequent to Battle's conviction becoming final, Battle's counsel filed for post-conviction relief with the state courts. The first application for post-conviction relief was filed on April 23, 1997, thereby leaving one day remaining on the one year time limitation in which to file a federal habeas application. The state district judge denied relief on September 22, 1998.

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[10] The AEDPA applies to this case as it was filed after the enactment of the AEDPA, or after April 24, 1996. **Lindh v. Murphy**, 521 U.S. 320, 117 S.Ct. 2059, 2060, 138 L.Ed.2d 481 (1997); **Nobles v. Johnson**, 127 F.3d 409, 414 (5th Cir. 1997), cert. denied, 523 U.S. 1139, 118 S.Ct. 1845, 140 L.Ed.2d 1094 (1998).

[11] The AEDPA became effective upon its enactment on April 24, 1996. The **Flanagan** Court thus held that one year from the AEDPA's enactment was a reasonable time within which to bring a federal habeas petition. **Flanagan**, 154 F.3d at 202.

On October 16, 1998, petitioner's counsel filed a Motion and Order to Fix Time for Filing Writ Applications.[12] (State Record, Vol. 4) The return date for filing the appeal was set for December 15, 1998. On December 10, 1998, petitioner sought and was granted an extension of time in which to file a writ to the Louisiana Court of Appeal, Fifth Circuit. (State Record, Vol. 4, Motion and Order.) The extension was granted until (Sunday) February 15, 1999.[13] Counsel mailed petitioner's writ application to the Court of Appeal, Fifth Circuit on February 17, 1999, and it appears to have been timely filed under state law. [14]

The Fifth Circuit denied the application on February 24, 1999. Petitioner was allowed thirty days under Louisiana law to file an application for supervisory writs to the Louisiana Supreme Court (see Rules of La. Sup. Ct. Rule 10, sec. 5(a)). Thirty days later, on March 26, 1999, the application was filed by petitioner.

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[12] Petitioner claims that his motion was timely filed in accordance with State law and the respondent does not counter this assertion. Louisiana Uniform Rules of Courts of Appeal 4-3 provides, "When an application for writs is sought to review the actions of a trial court, the trial court shall fix a reasonable time within which the application shall be filed in the appellate court, not to exceed thirty days from the date of the ruling at issue. Upon proper showing the trial court or the appellate court may extend the time for filing the application upon the filing of a motion for extension of return by the applicant, filed within the original or an extended date period."

[13] Petitioner claims that February 15, 1999, was Washington's Birthday, President's Day, a legal holiday and was also Lundi Gras. February 16, 1999, was Mardi Gras (a legal holiday).

[14] Louisiana Uniform Rules of Courts of Appeal 2-13 provides that: "The filing of such papers shall be deemed timely when the papers are mailed on or before the due date."

The application was denied on July 2, 1999. Petitioner filed a motion for reconsideration of the denial of the writ application. The Louisiana Supreme Court denied the motion on September 17, 1999.[15] There is nothing in the state record which shows the date on which petitioner filed for reconsideration.

Respondent's argument that petitioner's habeas application should be dismissed as untimely is primarily based upon an interpretation of the tolling provision of 2244(d)(2). Respondent asks this court not to consider the time lapse between petitioner's denial of post-conviction relief by the trial court and his filing for review of that decision with the appellate court as time "tolled". Likewise, the time lapse between the decision by the state appellate court and the filing of a request for review of that decision by the state supreme court would also not be considered as time tolled under respondent's interpretation of the statute. The language of 28 U.S.C. § 2244(d)(2) is somewhat ambiguous as no definition is given by the statute as to what constitutes a **"pending"** state application for post-conviction relief. The U.S. Fifth Circuit Court of Appeals has yet to address the issue of whether the AEDPA's statute of limitations remains tolled during the intervals between the state court's disposition of a state habeas petition and the filing of a petition at the next state appellate level. To date, most other circuit courts have dealt squarely with this issue, each finding that a properly filed state court petition is considered "pending" from the time it is first filed until finally disposed of by the state courts (or until further state appellate review is unavailable under the particular state's procedures). See **Adeline v. Stinson**, 2000 WL 276015, *2 (2nd Cir., March 14, 2000), citing **Bennett v. Artuz**, 199 F.3d 116, 118-119 (2nd Cir. 1999); **Swartz v. Meyers**, 204 F.3d 417 (3rd Cir. 2000); **Taylor v. Lee**, 186 F.3d 557 (4th Cir. 1999), cert.

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[15] **Battle v. Cain**, No. 99-KP-0872, 747 So.2d 559 (La. 1999).

denied, 120 S.Ct. 1262 (2000); **Peterson v. Gammon**, 200 F.3d 1202, 1204-5 (8th Cir. 2000); **Nino v. Galaza**, 183 F.3d 1003, 1005 (9th Cir. 1999), petition for certiorari filed, 68 USLW 3368 (Nov. 16, 1999); and, **Barnett v. Lemaster**, 167 F.3d 1321, 1323 (10th Cir. 1999). See also, **Guenther v. Holt**, 173 F.3d 1328 (11th Cir.), cert. denied, --- U.S. ---, 120 S.Ct. 811, 145 L.Ed.2d 683 (2000) and **Gaskins v. Duval**, 183 F.3d 8 (1st Cir. 1999) (both tolling the period of limitation but noting that it would not affect the disposition of the case). For the reasons discussed in detail in those opinions and being mindful of the seriousness of a dismissal of a first federal habeas petition,[16] this court considers the time when petitioner's state post-conviction application was "pending" to be the time from the filing of his application for post-conviction relief in the state trial court (April 23, 1997) until the Louisiana Supreme Court's ultimate denial of post-conviction relief (September 17, 1999).[17] Petitioner's federal habeas application was mailed September 18, 1999 which was a Saturday. Under Rule 6 of the Federal Rules of Civil Procedure, petitioner thus had until September 20, 1999, a Monday, to file his federal habeas petition. The petition was filed in this court on

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[16] See **Lonchar v. Thomas**, 517 U.S. 314, 324, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996)("Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.")

[17] It is possible, as respondent argues, that petitioner's motion for reconsideration (referred to by respondent as a motion for rehearing) is improper under state law. However, the Louisiana Supreme Court simply denied the motion, indicating "Rehearing denied", thus providing this court with little guidance regarding whether a state procedural bar was the reason for its denial. Accordingly, the court declines to find petitioner's federal habeas untimely on this basis alone.

September 20, 1999 and is thus considered timely filed. Therefore, the court addresses the merits of petitioner Battle's federal habeas claims.

. . .

New Orleans, Louisiana, this 6th day of April 2000.

/s/ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate Judge